A **BRUNEI REPORT**

Hassan bin Dollah v Public Prosecutor

HIGH COURT (BRUNEI) — CRIMINAL APPEAL NO 2 OF 96
ROBERTS CJ
B 6 FEBRUARY 1996

Criminal Procedure *— Plea of guilty — Duty of court — Failure of magistrate to record that the nature and consequences of defendant's plea had been explained by himself to defendant — Effect of — Criminal Procedure Code s 175(2)*

C ***Criminal Procedure*** *— Sentence — Consumption of controlled drugs — Second conviction — Whether magistrate obliged to consider the use of ss 262 or 263 of the Criminal Procedure Code in every case — Criminal Procedure Code ss 262 & 263 — Misuse of Drugs Act (Cap 27) s 6(b)*

D The defendant pleaded guilty in a magistrate's court to two charges brought under s 6(b) of the Misuse of Drugs Act (Cap 27) ('the Act') for the consumption of controlled drugs. The defendant who was not represented at the trial had two previous convictions, among them a conviction in 1989 for the same offence. The record of proceedings in the magistrate's court showed that both charges were read and E explained to the defendant in Malay and in answer to each charge the defendant was recorded as having said 'Understand Charge. Plead Guilty'. However it was not recorded whether or not the nature and consequences of the defendant's plea had been explained to him. The defendant having admitted the facts and his two previous convictions submitted arguments in mitigation after which he was F sentenced to three years' imprisonment on the first charge and one year's imprisonment on the second, both sentences running concurrently. The defendant appealed against both conviction and sentence. On appeal before the High Court it was argued for the defendant that the magistrate had failed to comply with s 175(2) of G the Criminal Procedure Code ('the CPC'). It was also argued that in spite of the mandatory minimum sentence prescribed for a second or subsequent offence under s 6(b) of the Act, the magistrate should have considered the possibility of the use of s 263 of the CPC.

H **Held**, quashing the defendant's convictions and sentences and ordering a retrial against the defendant on the same charges:

(1) Where the defendant pleads guilty and it appears on the record that the charge was read over to and explained to the defendant, it is to be presumed, in the absence of any evidence to the contrary, that the charge has been put to the defendant and that I the essential ingredients of the offence have been explained to him. If at a later stage it appears that the facts do not support the charge brought or that there is a possible defence to the charge, the magistrate should reverse the plea of guilty which he has

entered and record a plea of not guilty by the defendant (see p 289H–290A). A

(2) It is the duty of a magistrate not only to ensure that the record shows that the charge has been read, explained and understood but also that the accused understands the nature and consequences of his plea. Section 175 of the CPC imposes upon a magistrate a duty to record the fact that s 175(2) has been complied with. There is no set formula for doing so and it is sufficient if the record shows that the defendant does understand the nature and consequences of his plea and that this has been explained by himself to him by the magistrate. In the present case although the magistrate may have been satisfied that the defendant had understood the nature and consequences of his plea, since he did not record that this had been explained by himself to the defendant as required by s 175(2) of the CPC, the conviction would be quashed and a retrial ordered on the same charges (see p 291B–E). B C D

(3) A magistrate is not obliged to record that he has considered the use of ss 262 or 263 of the CPC in every case. If the possible application of the sections has been raised, it would be correct for the magistrate to mention it, but not otherwise. If on a second conviction for consumption of a controlled drug, a severe minimum penalty is prescribed, it can hardly be said that the offence is to be regarded as trivial in nature. It is a matter for those who make the laws in any country to decide which offences are to be regarded as serious by the courts, whose duty it is to interpret and apply those laws. There may be circumstances in which ss 262 or 263 of the CPC can be applied to a second or subsequent offender under s 6(b)of the Act but these circumstances will be rare (see pp 291H–292B). E F

[Bahasa Malaysia summary

Defendan mengaku salah di mahkamah majistret kepada dua pertuduhan di bawah s 6(b) Akta Penyalahgunaan Dadah (Cap 27) ('Akta tersebut') untuk penggunaan dadah yang dikawal. Defendan yang tidak diwakili semasa perbicaraan telah mempunyai dua sabitan dahulu, di antaranya suatu sabitan dalam tahun 1989 untuk kesalahan yang sama. Rekod prosiding di dalam mahkamah majistret menunjukkan bahawa kedua-dua pertuduhan tersebut telah dibaca dan diterangkan kepada defendan dalam bahasa Melayu dan sebagai jawapan kepada setiap pertuduhan defendan telah direkodkan sebagai menjawab 'Memahami Pertuduhan. Mengaku Bersalah'. Walaubagaimanapun, ianya tidak direkodkan samada jenis dan akibat pengakuan yang dibuat oleh defendan, telah diterangkan kepadanya. Defendan yang mengaku akan fakta-fakta dan kedua-dua sabitan dahulunya, telah memberi hujah-hujah peringanan setelah mana beliau G H I

A dihukum tiga tahun penjara di atas pertuduhan pertama dan satu tahun penjara di atas pertuduhan kedua, kedua-dua hukuman dijalankan bersama. Defendan telah merayu terhadap kedua-dua sabitan dan hukuman. Semasa rayuan di hadapan Mahkamah Tinggi ianya telah dihujah inter alia untuk defendan bahawa majistret gagal mematuhi s 175(2) Kanun Prosedur Jenayah ('KAJ') dan meskipun B hukuman mandatori minimum ditetapkan untuk kesalahan kedua atau berikutnya di bawah s 6(b) Akta tersebut, majistret sepatutnya mempertimbangkan kemungkinan penggunaan s 263 KAJ.

Diputuskan, membatalkan sabitan-sabitan dan hukuman-hukuman C dan memerintahkan perbicaraan semula terhadap defendan di atas pertuduhan-pertuduhan yang sama:

(1) Di mana defendan mengaku bersalah dan adalah nyata di atas rekod bahawa pertuduhan telah dibaca dan diterangkan kepada defendan ianya mestilah dianggap, di dalam ketiadaan keterangan D sebaliknya, bahawa pertuduhan tersebut telah dikemukakan kepada defendan dan unsur-unsur asas kesalahan telahpun diterangkan kepadanya. Jikalau pada peringkat kemudiannya, iannya jelas bahawa fakta-fakta tidak menyokong pertuduhan tersebut ataupun jika ada kemungkinan terdapatnya pembelaan kepada pertuduhan itu, majistret hendaklah mengakaskan E pengakuan bersalah yang telah dicatatkan oleh beliau dan merekodkan satu pengakuan tidak bersalah oleh defendan (lihat ms 289H–290A).

(2) Ia adalah menjadi tugas seorang majistret bukan sahaja untuk memastikan bahawa rekod menunjukkan bahawa pertuduhan F tersebut telahpun di baca, diterangkan dan difahami tetapi juga bahawa defendan memahami jenis dan akibat pengakuannya. Seksyen 175 KAJ mengenakan suatu tugas ke atas seorang majistret untuk merekodkan fakta bahawa s 175(2) KAJ telah dipatuhi. Tidak ada formula yang tetap untuk berbuat demikian dan adalah memadai jikalau rekod menunjukkan bahawa defendan G telah memahami jenis dan akibat pengakuan beliau dan bahawa ini telah diterangkan kepadanya oleh majistret. Di dalam kes ini, walaupun majistret mungkin puas bahawa defendan telah memahami jenis dan akibat pengakuannya, oleh kerana beliau tidak merekodkan bahawa hal ini telah diterangkan kepada H defendan sepertimana yang diperlukan oleh s 175(2) KAJ, sabitan tersebut dibatalkan dan perbicaraan semula diperintahkan di atas pertuduhan-pertuduhan yang sama (lihat ms 291B–E).

(3) Seorang majistret tidak diwajibkan merekodkan bahawa beliau telah mempertimbangkan kegunaan ss 262 atau 263 KAJ di dalam setiap kes. Sekiranya kemungkinan pemakaian seksyen- I seksyen tersebut dibangkitkan, ia adalah betul jikalau majistret menyebutkannya, tetapi bukan sebaliknya. Sekiranya satu penalti

minimum yang keras dikenakan di atas sabitan kedua untuk penggunaan dadah terkawal maka tidak boleh dikatakan kesalahan tersebut adalah jenis yang ringan. Adalah menjadi hal untuk mereka yang menggubal undang-undang dalam sesebuah negara untuk menentukan kesalahan-kesalahan mana yang harus dianggap serius oleh mahkamah, yang bertugas mentafsirkan dan memakai undang-undang tersebut. Mungkin ada keadaan-keadaan di mana ss 262 atau 263 KAJ boleh digunakan terhadap pesalah kali kedua atau berikutnya tetapi keadaan-keadaan ini adalah jarang (lihat ms 291H–292B).]

Notes

For cases on plea of guilty, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1737–1826.

Cases referred to

Chua Ah Gan v PP Crim Appl 1/58 (unreported)
Heng Kim Khoon v PP [1972] 1 MLJ 30
Isa bin Hj Md Ali & Anor v PP 1995 Brunei Judgment 37
Koh Mui Keow v R [1952] MLJ 214
Lo Kim Peng v PP [1979] 1 MLJ 249
PP v Leng Chow Teng [1985] 1 MLJ 229
PP v Tengku Hitam [1962] MLJ 414
Wan Aun Tun v PP (30 September 1995) (unreported)

Legislation referred to

Criminal Procedure Code [Brunei] ss 175(2), 262, 263
Criminal Procedure Code [Malaysia] s 173
Misuse of Drugs Act (Cap 27) [Brunei] ss 6(b), 29(3A)

Geoffrey Sim for the appellant.
Alice Khan for the Public Prosecutor.

Cur Adv Vult

Roberts CJ:

Preliminary

Hassan bin Dollah ('the defendant') appeals both against conviction and sentence imposed by a magistrate on 16 January 1996.

The defendant pleaded guilty to two charges brought under s 6(b) of the Misuse of Drugs Act (Cap 27) ('the Act') namely consumption of codeine on 15 June 1995, and the consumption of diazepam on the same date.

A Codeine is a Class B controlled drug. Diazepam is a Class D controlled drug. The necessary consent to prosecute was produced to the court.

The defendant had previously been convicted, in 1989, of consumption contrary to s 6(b) of the Act.

Section 29(3A) of the Act, which came into force on 25 June 1992,
B provides that where a person, convicted of an offence under s 6, is again convicted of a similar offence 'he shall be liable ... (b) in the case of an offence under paragraph (b) to imprisonment for a term of not less than three years'.

The trial

C The defendant was not represented.

The record states that both charges were 'read and explained to the defendant in Malay'.

In reply, the defendant in answer to each charge, was recorded as
D having said 'Understand Charge. Plead guilty'.

The facts and analyst's certificate were tendered. The defendant admitted the facts. He also admitted his two previous convictions, among them a conviction for consumption in 1989, contrary to s 6(b) of the Act.

The defendant then submitted arguments in mitigation. He was
E thereafter sentenced to three years' imprisonment on the first charge and one year's imprisonment on the second, the sentences to run concurrently.

Conviction

It was argued for the defendant that the magistrate failed to comply with s 175(2) of the Criminal Procedure Code ('CPC') which is in the following
F terms:

> Conviction on plea of guilty
>
> (2) If the accused pleads guilty to a charge, whether as originally framed or as amended under s 178, the plea shall be recorded as nearly as possible in the words used by him and he may be convicted thereon;
>
> G Provided that before a plea of guilty is recorded, the court may hear the complainant and such other evidence as it may consider necessary and shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

H Section 175 of the CPC was complied with by the magistrate, who recorded the defendant's plea in the words used by the defendant.

The magistrate further recorded that the charges were read over to and explained to the defendant. Where this appears in the record, it is to be presumed (in the absence of any evidence to the contrary) that the
I charge has been put to the defendant and that the essential ingredients of the offence have been explained to him.

If at a later stage, it appears for example, that the facts do not support the charge brought, or that there is a possible defence to the charge, a

magistrate should reverse the plea of guilty which he has entered and record a plea of not guilty by the defendant.

It was submitted on behalf of the defendant that s 175(2) of the CPC is mandatory, in respect of the last part of the proviso to the subsection.

Although the first part of that proviso is discretionary, the word 'shall' imposes on the magistrate a duty which he must perform.

The equivalent Malaysian section (s 173 of the Malaysian Criminal Procedure Code (FMS Cap 6)) has been considered in various cases — see

PP v Tengku Hitam [1962] MLJ 414;

Koh Mui Keow v R [1952] MLJ 214;

Lo Kim Peng v PP [1979] 1 MLJ 249;

PP v Leng Chow Teng [1985] 1 MLJ 229;

Chua Ah Gan v PP Crim Appl 1/58 (unreported).

In each of these cases, it was said, by the judge before whom an appeal came, that the duty of the magistrate was not only to ensure that the record shows that the charge has been read, explained and understood but also that the accused 'understands the nature and consequences of his plea'.

In the earlier case of *Isa bin Hj Md Ali & Anor v PP* [1995] Brunei Judgments 37, I commented as follows:

> It follows from this that the defendant, when he pleads guilty, must know the nature of his plea (ie that it is one of guilt) and the consequence of it (which is that he will be liable to whatever penalty is prescribed by law for that offence).
>
> It would be wise in future if magistrates would consider, when taking a plea of guilty, inserting in the record 'Section 175 CPC complied with'. This will both remind the magistrate of the obligation of that section and, in most cases at least, ensure that an argument is not advanced on appeal to the effect that the section has not been followed.

I do not doubt that an unrepresented defendant will realize that the effect of his plea will be that he is guilty of the offence. But, on reflection, I doubt if he would realize, as I think he should do, what penalty is prescribed by law.

In the case of consumption of a controlled drug, contrary to s 6(b) of the Act, a fine for the first offence becomes a sentence of not less than three years' imprisonment on a second or subsequent conviction for the same offence. It is a big jump, which would not be expected to be appreciated by a person who did not know of the mandatory provision of the Act.

The passage quoted from *Isa*'s case, is not in strong enough terms. In that I suggested that in future magistrates should record that s 175 of the CPC had been complied with. I ought to have made it clear to magistrates

A that a duty is imposed on them by the section and that they must in future record the fact that s 175(2) of the CPC has been complied with.

It was at one time the custom of magistrates to note on the record 'nacp' (nature and consequences of plea explained), which would have fulfilled this requirement.

B In *Heng Kim Khoon v PP* [1972] 1 MLJ 30, Sharma J referred, while emphasizing the need to be careful before accepting a plea, to the use of the following formula — 'Charge read over and explained to the accused and understood by him. Pleads guilty. Understands the nature and consequences of his plea.'

C I see nothing wrong in something of this nature appearing in the record. If it does, it should be presumed that the magistrate did explain to the defendant the nature and consequences of the plea of guilty which he had made.

There is no set formula. It is sufficient if the record shows that the D defendant does understand the nature and consequences of his plea and that this has been explained to him by the magistrate.

The matter would be made even clearer by the addition of the words 'as required by s 175(2) of the CPC' after 'plea' in the above quotation from *Heng Kim Khoon v PP* [1972] 1 MLJ 30.

E The magistrate may well, in the present case, have been satisfied that the defendant had understood the nature and consequences of his plea, but he did not record that this had been explained to the defendant by the magistrate as I think he is obliged to do, by virtue of s 175(2) of the CPC.

Because of this omission, I felt obliged to quash the conviction of the defendant and order his retrial on the same charges.

F

Sentence

It was submitted that, in spite of the mandatory minimum sentence prescribed for a second or subsequent offence against s 6(b) of the Act, the magistrate should have considered the possibility of the use of s 263 of the G CPC.

I was referred to *Wan Aun Tun v PP* (30 September 1995) (unreported) in which it was said that s 263 of the CPC is applicable, notwithstanding that a mandatory sentence of imprisonment is imposed, as it is in the case of a second or subsequent conviction for an offence against s 6(b) of the Act.

H

I do not consider that the magistrate is obliged to record that he has considered the use of ss 262 or 263 of the CPC in every case. If the possible application of the section has been raised, it would be correct for him to mention it, but not otherwise.

I I also observe that if, on a second conviction for consumption of a controlled drug, a severe minimum penalty is prescribed, it can hardly be said that the offence is regarded as trivial in nature.

It is a matter for those who make the laws in any country to decide which offences are to be regarded as serious by the courts, whose duty it is to interpret and apply those laws.

The continued consumption of a controlled drug by a defendant is a matter which is taken seriously in Brunei. There may be circumstances in which ss 262 or 263 of the CPC can be applied to a second or subsequent offender under s 6(b) of the Act, but this will be rare.

Conclusion

The appeal against conviction and sentence is allowed. The convictions and sentences are quashed. A retrial is ordered against the defendant on the same charges. Bail to be granted to the defendant, without conditions, pending the retrial.

Appeal allowed

Reported by Andrew Christopher Simon